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In the Supreme Court of the United States

OCTOBER TERM, 1945

MAX LEVINSON, PETITIONER

v.

SPECTOR MOTOR SERVICE, A CORPORATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

MEMORANDUM FOR THE SOLICITOR GENERAL AS AMICUS CURIAE

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The question in this case is whether a person working less than half the time as a loader of trucks comes within the exemption in Section 13 (b) (1) of the Fair Labor Standards Act for "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act." The Court has requested the views of the Interstate Commerce Commission and of the Solicitor General, and this memorandum is submitted by the Solicitor General pursuant to that request.

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We agree with the construction of the Motor Carrier Act set forth in the brief *amicus curiae* being filed on behalf of the Interstate Commerce Commission. The Commission argues that if a person is engaged in operations relating to safety for any time at all, it has some power over him, and that this result is necessary if dangerous driving by tired drivers who work long hours performing other services and spend only a short time in driving is to be avoided.[1] If the answer to the question as to the construction of the Fair Labor Standards Act is to be found exclusively in the Motor Carrier Act, the employment here involved would in our view be exempt. The consequences of not taking the purposes of the Fair Labor Standards Act, as well as those of the Motor Carrier Act, into account are such, however, as to make us reluctant to suggest that the case may be disposed of so easily. See *Southland Gasoline Co.* v. *Bayley*, 319 U. S. 44, 47; *United States* v. *American Trucking Associations*, 310 U. S. 534, 542.

The Interstate Commerce Commission has held that loaders are subject to the Commission's jurisdiction under Section 204 of the Motor Carrier

[1] Since the issue here relates to the applicability of the exemption from Section 7 of the Fair Labor Standards Act, which operates on a work-week basis, we assume that the Section 13 (b) (1) exemption would clearly not apply in a work-week where the employee performed no work subject to the power of the Interstate Commerce Commission.

Act because a truck improperly loaded (too heavily on one side or end or at the top) would be dangerous on the highways. *Maximum Hours of Service of Motor Carrier Employees,* 28 M. C. C. 125, 133–134. Although this may be so, the relationship between the hours worked by loaders and highway accidents seems very tenuous: See *Walling* v. *Comet Carriers,* 151 F. 2d 107, 110 (C. C. A. 2), pending on petition for certiorari, No. 609.[2] Congress clearly had drivers in mind when the legislation here in question was enacted, as the review of the legislative history in the opinion of this Court in *United States* v. *American Trucking Associations,* 310 U. S. 534, indicates. Moreover, although the Commission has asserted power over loaders, it has never in the 10 years since the Motor Carrier Act was passed sought to prescribe any maximum hours for employees other than drivers.[3] The situation thus differs from *Southland Gasoline Co.* v. *Bayley,* 319 U. S. 44, inasmuch as Congress assumed correctly that the Commission would es-

[2] See also the dissenting opinions of Commissioners Splawn and Patterson, 28 M. C. C. at 140–141.

[3] The Commission has asserted power over mechanics, leaders, and drivers' helpers, in addition to drivers. *Maximum Hours of Service of Motor-Carrier Employees,* 28 M. C. C. 125, at 132–135, 138–139. The Commission has established a maximum of sixty hours per week for drivers. *Maximum Hours of Service of Motor Carrier Employees,* 3 M. C. C. 665, 690–692.

tablish maximum hours for drivers, the class involved in that case.

If to this is added the fact that particular employees may work only a small proportion of their time performing work in which the Commission has any interest under the Motor Carrier Act, the relationship between what that employee does and what Congress had in mind in the Fair Labor Standards Act exemption seems remote indeed. Although there is no explicit legislative history on the point, we believe that Congress would not have intended the exemption to reach employees who work an insubstantial portion of their time in work with respect to which the Interstate Commerce Commission has fixed no maximum hours, and as to which there might be a question regarding its power to do so.

The consequence of allowing an exemption from the Fair Labor Standards Act in such cases would also be serious in that it would open an easy avenue of evasion. An employer could readily assign employees primarily engaged in other activities to loading, repair work, or "helping" for a very short time each week, and thus subject them to the unexercised "power" of the Interstate Commerce Commission for the sole purpose of avoiding any regulation of hours whatsoever.

We find it difficult to reconcile the sensible interpretation of the law which we believe is most

consistent with the legislative policy with the literal meaning of the words of the Fair Labor Standards Act. The literal construction, however, produces a result which seems absurd enough to warrant resort to the doctrine of *Holy Trinity Church* v. *United States,* 143 U. S. 457. As this Court has said in dealing with a similar problem with respect to the very statutory provisions involved here, when the plain "meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." *United States* v. *American Trucking Associations,* 310 U. S. 534, 543.

The construction of the exemption as not extending to employees who work an insubstantial proportion of their time in activities subject to the power of the Interstate Commerce Commission is in accordance with the view of the Illinois Supreme Court in this case and with that of the Circuit Court of Appeals for the Second Circuit in *Walling* v. *Comet Carriers,* 151 F. 2d 107, 111, pending on petition for certiorari No. 609. To the same effect see *Davis* v. *Southern California Freight Lines,* 8 Wage Hour Reporter, 1151 (S.

D. Calif. Nov. 1945) and *Walling* v. *Griffin Cartage Company*, 62 F. Supp. 396, 400 (E. D. Mich).*

The question whether a particular employee has worked such a substantial portion of his time in services related to safety of operation as to bring him within the intent of the exemption raises the usual problems inherent in drawing lines. The Administrator, in order to establish a definite guiding criterion for the practical administration and enforcement of the Act, has interpreted the exemption as drawing a line at the 50% point; only employees who work at least 50% of the time performing services subject to the power of the Interstate Commerce Commission are regarded as exempt. Interpretative Bulletin No. 9 (revision of October 1943), paragraph 4. This interpretation was adopted following "the well-considered opinion" of the court in *Hutchinson* v. *W. C. Barry, Inc.*, 50 F. Supp. 292 (D. Mass.). See *Fletcher* v. *Grinnell Bros.*, 150 F. 2d 337, 340 (C. C. A. 6). Cf. *Anuchick* v. *TransAmerican Freight Lines*, 46 F. Supp. 861 (E. D. Mich.), holding that an employee who spent more than 20% of his time in work which did not affect safety operations was not within

*This construction does not result in any conflict between the operations of the two statutes or withdraw the employees from the jurisdiction of the Commission. The requirement as to the payment of overtime for hours in excess of 40 per week is in no way incompatible with compliance with any maximum hours the Commission may prescribe.

the exemption. Although it is difficult to discover support in the statute for the drawing of any such mathematical line, the Administrator's standard has practical advantages and was apparently deemed a reasonable one for accomplishing the purpose of the exemption, in *Walling* v. *West Kentucky Coal Co.*, 8 Wage Hour Reporter 179 (W. D. Tenn.), and *Walling* v. *Gordon's Transports*, 8 Wage Hour Reporter 838 (W. D. Tenn.); see also *Hutchinson* v. *W. C. Barry, Inc.*, *supra*. Contra: *Walling* v. *Comet Carriers*, 151 F. 2d 107 (C. C. A. 2), pending on petition for certiorari, No. 609; *Crean* v. *Moran Transportation Lines*, 57 F. Supp. 212 (W. D. N. Y.) Cf. *Keegan* v. *Ruppert*, 6 Wage Hour Reporter 676 (S. D. N. Y. 1943); *Potashnick Local Truck System* v. *Archer*, 179 S. W. 2d 696 (Ark.).

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

DECEMBER 1945.

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